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Nos. 82-206 and 82-229 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner

v.

CARL W. STOTTS, *et al.*,
Respondents

MEMPHIS FIRE DEPARTMENT, *et al.*,
Petitioners

v.

CARL W. STOTTS, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF ON THE MERITS FOR PETITIONER, FIREFIGHTERS LOCAL UNION NO. 1784

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QUESTION PRESENTED FOR REVIEW

Whether a district court has the authority to modify a consent decree, silent in regard to layoffs, in such a manner that a bona fide seniority system calling for layoff by seniority is abrogated to the detriment of innocent incumbent employees, in an action where there has been no adjudication of discrimination by the employer or the union.*

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* Firefighters Local Union No. 1784 has no parent, subsidiary or affiliate required to be reported under S.Ct.R. 28.1. The local union is itself an affiliate of the International Association of Firefighters, AFL-CIO, CLC.

LIST OF PARTIES

Petitioner Firefighters Local Union No. 1784 intervened in the District Court and appeared as an appellant in Court of Appeals Nos. 81-5348 and 81-5349. Memphis Fire Department, Robert W. Walker, City of Memphis and Joseph Sabatini were also appellants below and are petitioners in No. 82-229. Carl W. Stotts, individually and as a class representative on behalf of all others similarly situated, and Fred L. Jones appeared as appellees in Court of Appeals Nos. 81-5348 and 81-5349, respectively, and are respondents in Nos. 82-206 and 82-229.

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BRIEF ON THE MERITS FOR PETITIONER, FIREFIGHTERS LOCAL UNION NO. 1784

OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals for the Sixth Circuit of which review is sought is reported officially at 679 F.2d 541. The judgment of the Court of Appeals is set forth in the Joint Appendix at J.A. 141. The opinion is set forth in the appendix to the petition of Firefighters Local Union No. 1784 at App. 1. The oral ruling of the District Court, not reported, is reproduced in the appendix to the Union's petition at App. 77.

JURISDICTION

The jurisdiction of the Court rests on 28 U.S.C. § 1254 (1). The judgment of the Court of Appeals was entered on May 7, 1982. The petition for a writ of certiorari was timely filed on August 4, 1982 and was granted on June 6, 1983.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are as follows: 42 U.S.C. §§ 1981, 1983 and 1988 and §§ 703(a), 703(h), 703(j) and 706(g) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a), 2000e-2(h), 2000e-2(j) and 42 U.S.C. § 2000e-5(g).

The text of the statutes is set forth in the appendix thereto at 1a.

STATEMENT OF THE CASE

The cases presented for review arise from class actions filed by respondents, black male employees of the Memphis Fire Department (hereinafter "respondents"), in the United States District Court for the Western District of Tennessee.[1] Respondents asserted claims of violations of rights secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 (Pub.L. 92-261, March 24, 1972) and by 42 U.S.C. §§ 1981 and 1983 (Pet. A. 59). Particularly, the respondents alleged that certain promotional policies and practices on the part of the original defendants (hereinafter collectively the "City") were unlawful and favored white employees over their minority counterparts in promotional decisions (J.A. 10, 16). The respondents did not attack the layoff or seniority policies of the City. The relief prayed for the

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[1] *Stotts v. Memphis Fire Dep't*, No. 77-2104 (W.D. Tenn. filed Feb. 11, 1977) (J.A. 8); *Jones v. Memphis Fire Dep't*, No. 79-2441 (W.D. Tenn. filed June 19, 1979) (J.A. 15). The two actions were consolidated in September, 1979 (Union Petition [hereinafter referred to as "Pet."] A. 5).

respondents included an award of back pay, reimbursement of lost pensions, Social Security, experience, training opportunities and promotions (J.A. 11, ¶ 4; 17, ¶4). Petitioner Firefighters Local Union No. 1784 (hereinafter "Union") was not named as a defendant in either complaint. Respondents did not pray for an award of constructive competitive seniority. As a result, the Union did not intervene as the City of Memphis Fire Services Division seniority system was not directly implicated by these actions.

When these actions were filed there was in effect a city-wide seniority system that had been adopted by the City of Memphis as an employment practice in 1973 (J.A. 49). Under the city-wide seniority system, an employee's seniority is calculated on the basis of length of service in permanent employment with the City (J.A. 67, 85). Seniority status is freely transferable from one city division to another (i.e., from sanitation to fire) (J.A. 70-71, 103) and from one job classification to another (i.e., from private to lieutenant) (J.A. 67, 103). The city-wide seniority system was negotiated into the City's Memorandum of Understanding with the Union in 1975 (Pet. A. 80-81; J.A. 49, 115). The city-wide seniority system conferred competitive seniority status to individual employees in the Fire Services Division for priority in job decisions regarding transfers (J.A. 42, 103) and layoffs (Pet. A. 80-81; J.A. 49, 115, 119).

The instant actions were also filed against the background of a prior consent decree entered into by the City of Memphis and the United States Department of Justice in 1974 (hereinafter the "1974 Decree") (J.A. 98-115). The 1974 Decree arose from *United States v. City of Memphis*, No. 74-286 (W.D.Tenn.). This action alleged that the City had engaged in a pattern or practice of discrimination based on race and sex in hiring and promotion within its divisions (J.A. 98). The 1974 Decree resolved all issues raised by the complaint in regard to several city divisions, including the Fire Division (J.A.

98). The 1974 Decree explicitly states that the entry of the decree "shall not constitute an adjudication or admission by the City of any violation of law or findings on the merits of the case" (J.A. 99).

In the 1974 Decree the City agreed to undertake the long-term goal of "achieving throughout the work force proportions of black and female employees in each job classification approximating their respective proportions in the civilian work force" by means of hiring qualified black applicants to fill vacancies in the force (J.A. 101). The City also agreed to attempt to meet an interim percentage hiring goal (J.A. 105).

The 1974 Decree contains no admission by the City that particular individuals were entitled to "victim" status, nor does the 1974 Decree award constructive competitive seniority. The 1974 Decree did not dilute the city-wide seniority system. To the contrary, it endorses the use of the system in regard to the City's employment decisions in these terms:

> The City shall, for all purposes of promotion, transfer and assignment, compute the seniority of a person in the affected class as defined in paragraph 5 [incumbent female and minority employees of the City], as the total seniority of that person with the City.

(J.A. 103)[2] Neither does the 1974 Decree commit the City to a specified timetable for achieving its long-term goals. Rather, it is noted that the goals are "subject to the anticipated budgeted vacancies in the City" (J.A. 105). The 1974 Decree utilizes hiring as the exclusive means of achieving its long-term goals in the Fire Division. No provision of the 1974 Decree has an adverse impact on the job security or seniority rights of incumbent fire employees.

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[2] As indicated above, the seniority system only applied to transfers and layoffs in the Fire Services Division (Pet. A. 80-81).

Against this background, the instant actions were settled by the entry of a consent decree in the District Court on April 25, 1980 (hereinafter the "1980 Decree") (Pet. A. 59-69). As with the 1974 Decree, by agreeing to the entry of the 1980 Decree, the City did not "admit any violations of law, rule, or regulation with respect to the allegations made by plaintiffs [respondents herein] in their complaints" (Pet. A. 60).[3]

The 1980 Decree adopts the same long-term goal and hiring relief as that contained in the 1974 Decree (Pet. A. 64). The 1980 Decree also adopts the approach of the 1974 Decree in establishing an interim hiring goal for the City to fill "on an annual basis at least 50% of all vacancies with qualified black applicants" (Pet. A. 64; J.A. 101). Neither decree requires the City to hire any particular number of employees (J.A. 101-02). The 1980 Decree contains an additional goal "of promoting blacks in the proportion of at least 20% for each civil service classification or uniformed rank as measured on an annual basis" (Pet. A. 65). As was true with the 1974 Decree, the 1980 Decree contains no admission by the City that particular individuals were entitled to "victim" status, nor does the Decree award constructive competitive seniority. Likewise, the 1980 Decree did not dilute the city-wide seniority system. The 1980 Decree contains an explicit waiver by plaintiffs of "a hearing and findings of fact and conclusions of law on all issues raised by the complaints" (Pet. A. 60). No class member raised objections to the 1980 Decree prior to or after its entry (Pet. A. 7). The respondents also waived any entitlement to further relief:

> *Both plaintiffs [respondents] and the class they represent shall seek no further relief* for the acts, practices or omissions alleged in the complaints *save to*

[3] The 1980 Decree states the intention of the parties to parallel and supplement therein the relief provided in the 1980 Decree, thereby disclaiming an intention to conflict with the 1974 Decree (Pet. A. 60).

> *enforce the provisions of this decree, thereby waiving the right to seek further relief.*

(Pet. A. 61) (emphasis added). While the 1980 Decree does contain boilerplate language to the effect that: "[t]he court retains jurisdiction of this action for such further orders as may be necessary or appropriate to effectuate the purposes of this decree" (Pet. A. 69), this "retain[ed] jurisdiction" is limited by the terms of respondents' waivers. As the 1980 Decree left intact the operation of the city-wide seniority system and did not otherwise adversely affect the rights of its members the Union did not voice objections to the entry of the decree.[4]

The record reflects that the total number of blacks hired in the Fire Department between the entry of the 1974 Decree and May, 1981 (including rehires) reached the level of fifty-six percent, thus exceeding the City's interim goals (J.A. 48). While the Justice Department had retained the option of establishing specific numerical ratios for the employment of black firefighters had the City failed in its good-faith attempts to meet the interim goals established by the 1974 Decree (J.A. 105-06), this option was not exercised due to the City's success in this regard. In May, 1981, following that history of compliance with the terms of the 1974 and 1980 Decrees, the city administration announced that layoffs of municipal employees would be necessitated due to an anticipated budget deficit in the upcoming fiscal year. The respondents stipulated at the hearing on respondents' motion for injunctive relief, discussed *infra*, to the City's financial

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[4] The factual exposition in the opinion of the Court of Appeals includes a discussion of certain objections raised to the entry of the 1980 Decree by a group of 11 nonminority firefighters, (Pet. A. 6-8). This group's attempted intervention is treated more fully in *Orders v. Stotts*, 679 F.2d 579 (6th Cir.), *cert. denied*, 103 S.Ct. 297 (1982). The Union did not participate in this intervention attempt. The discussion by the Court of Appeals of the *Orders* intervenors' objections to the 1980 Decree (Pet. A. 26-30) is not pertinent to the instant controversy.

need to implement layoffs (J.A. 75). In anticipation of the layoffs, the City promulgated a formal layoff policy which addressed all aspects of the anticipated layoffs (J.A. 82-96). The layoff policy reaffirmed the City's obligation to lay off Fire Department personnel, if necessary, in conformance with the city-wide seniority system. Neither by its promulgation of the layoff policy nor in any other way did the City announce its intention to renounce or repudiate its commitment to the eventual achievement of the long-term goals agreed to in the 1974 and 1980 Decrees.

On May 4, 1981, the respondents applied for and obtained a temporary restraining order enjoining the City from laying off or reducing in rank any black fire employees (J.A. 20-23). Respondents contended that the routine application of the city-wide seniority system would "effectively destroy the affirmative relief" granted by the 1980 Decree (J.A. 21). The United States Department of Justice neither joined respondents' petition nor sought similar relief in its parallel action.

On May 5, 1981, the District Court permitted the Union to intervene (J.A. 24). The Union intervened in order to assert the rights and interests of its members in the impending layoffs and reductions in rank (J.A. 24). The order allowing the Union's intervention was entered with the consent of all parties. This intervention marked the first occasion that the Union had sought to assert an interest in these actions.

On May 8, 1981, the District Court held an evidentiary hearing on the respondents' request for a preliminary injunction (Pet. A. 72-76; J.A. 29-119). Following the hearing, the District Court found that the 1980 Decree did not address layoffs or the method to be used in the event that layoffs or reductions in rank became necessary

(Pet. A. 73, 77-78).[5] Further, the Court found that the City's layoff policy was not adopted with the purpose or intent to discriminate on the basis of race,[6] but concluded that the application of the city-wide seniority policy would have a discriminatory effect.[7] The District Court found the city-wide seniority system to be non-bona fide due to this discriminatory effect.[8]

The District Court held that it possessed the authority to modify the 1980 Decree. It did so by enjoining the City from implementing the city-wide seniority system insofar as it would decrease the percentage of minority

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[5] The District Court found that the 1980 Decree did not contemplate the circumstances that layoffs might be occasioned by fiscal difficulties, as layoffs were unprecedented in the City's recent history (Pet. A. 73). While the Court of Appeals characterizes the District Court's finding to be that there existed "changed" circumstances (Pet. A. 8, *passim*), the District Court did not go so far in its findings. Indeed, the appearance of the clause in the Union's Memorandum of Understanding providing for seniority-based layoffs as early as 1975 (Pet. A. 81) makes it clear that the City's layoff decision was not a "changed circumstance" and could have been anticipated when the 1980 Decree was entered in April of 1980.

[6] This finding supports the legal conclusion that the city-wide seniority system was bona fide in nature as routinely applied in the layoff situation. *Teamsters v. United States*, 431 U.S. 324, 356 (1977). This finding, as noted by the Court of Appeals, has not been challenged on appeal (Pet. A. 11 n.6).

[7] The statistics relied upon by the District Court (Pet. A. 9, 70-71) are not indicative of post-Act (post March 24, 1972) discrimination or of violations by the City of the terms of the 1974 and 1980 Decrees. As promotional goals were not adopted in the Fire Division via the 1974 Decree (J.A. 107, ¶ 15), the table of promotional statistics contained in the Court of Appeals opinion (Pet. A. 9 n.5) is not indicative of a violation of either the 1974 or 1980 Decrees. In fact, the District Court concluded that the City had not been defiant or contemptuous (Pet. A. 75).

[8] The legal conclusion of the District Court that the city-wide seniority system was non-bona fide was set aside properly as error by the Court of Appeals (Pet. A. 11 n.6).

employees within four classifications in the Fire Department (Pet. A. 77-79).[9] The District Court ordered the City to propose a layoff method consistent with its injunction (Pet. A. 79).

Judgment on the District Court's ruling was entered on May 18, 1981 (Pet. A. 77). Petitioners noticed their appeals (J.A. 5) and moved to stay the District Court's injunction pending appeal (J.A. 120-22). The motion was denied by the District Court (J.A. 122-23), as were similar motions made to the Court of Appeals by petitioners (Pet. A. 12). The appeals were advanced on the calendar of the Court of Appeals for oral argument and expedited consideration on September 15, 1981. The opinion of the Court of Appeals, however, was not filed until May 7, 1982, one year after the hearing before the District Court.

The Court of Appeals affirmed the result below. Although overruling the reasoning of the District Court with regard to the bona fides of the city-wide seniority system,[10] the Court of Appeals concluded that the District Court had the authority to modify the 1980 Decree upon a showing of changed circumstances. The Court of Appeals also concluded that the interests of the Union in the continued application of the city-wide seniority system presented no impediment to such a modification. The judgment of the Court of Appeals was filed on May 7, 1982 (J.A. 141-42). The Union's petition for certiorari was timely filed with the Court on August 4, 1982, and a writ of certiorari was granted on June 6, 1983.[11]

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[9] Following a second hearing before the District Court on June 23, 1981 (J.A. 125-37), the preliminary injunction was expanded to include three additional classifications not represented by the Union (City Pet. A. 82-83).

[10] *See* note 8, *supra*.

[11] The City also applied for a writ of certiorari which was granted by the Court and consolidated for review with the Union's petition. *Memphis Fire Dep't v. Stotts*, 679 F.2d 541 (6th Cir. 1982), *cert. granted*, 103 S.Ct. 2451 (1983) (No. 82-229).

SUMMARY OF ARGUMENT

The orders in dispute impermissibly modified a consent decree that had been entered in a promotional discrimination case by enjoining the employer's routine application of a seniority system to determine the order of layoffs of municipal employees and by requiring the employer to maintain the racial balance then existing in each affected job classification. In doing so, the District Court reached outside the "four corners" of the consent decree to impose a new provision allegedly to implement its "purposes" in violation of the principles expressed by the Court in *United States v. Armour & Co.*, 402 U.S. 673 (1971). The lower courts reached this result despite: (1) the absence of an adjudicated or admitted violation of the law on the part of the parties affected thereby, (2) the express waiver of additional relief contained in the consent decree itself and (3) the lack of an ambiguity in the consent decree. Under these circumstances, there was no basis for the imposition of a new term or provision in the decree.

The lower courts exceeded their authority in modifying the consent decree. Due to the strong interests in the finality of judgments, such a modification is permissible only where changed circumstances have transformed the original decree into an "instrument of wrong." *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). The circumstances surrounding the municipal layoffs at issue were not "changed" circumstances as would justify modification. Neither are the consequences of the routine application of a bona fide seniority system "wrong" in nature under Title VII of the Civil Rights Act of 1964, the statute which the lower courts sought to enforce. *See* 42 U.S.C. § 2000e-2(h). *Teamsters v. United States*, 431 U.S. 324 (1977).

Rather, the modification imposed by the lower courts is itself "wrong," as it impermissibly: (1) trammels the interests of innocent nonminority incumbents to main-

tain racial balance in favor of persons who had not established "victim" status, (2) imposes a new duty on petitioners in the absence of proper judicial proceedings and (3) disregards the waiver of further relief that was made by respondents. In addition, the orders below would foster uncertainties regarding the finality of Title VII settlements that would make the chances of future settlements much less likely.

The orders imposing the nonconsentual modification of the consent decree had the effect of imposing involuntary class-based relief which contravenes the directives of the statutes that the lower courts sought to enforce. The consent decree at issue neither constitutes an adjudication nor an admission of a violation of the law on the part of petitioners. Thus, the lower courts impermissibly imposed substantial additional relief in the absence of a proven or admitted violation of the law and despite respondents' express waiver of such relief.

The orders below were outside the scope of the remedial authority under the statutes which respondents sought to enforce. Those statutes specifically limit the scope of permissible relief to making whole the "victims" of racial discrimination. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Milliken v. Bradley*, 418 U.S. 717 (1974). Rather than granting relief to individual "victims," the relief ordered by the District Court imposed a class-based quota remedy in contravention of Title VII and its clear legislative history. Innocent nonminority incumbents were displaced inequitably. The disputed orders constitute an abuse of discretion, requiring reversal.

Finally, the lower courts disregarded the congressional policy expressed in Title VII protecting routine application of a last-hired, first-fired seniority system. The orders below abrogated the routine operation of a bona fide seniority system to impose a preference based on race. In conferring "constructive" or "fictional" competitive

seniority to junior black employees who had not demanded such relief in the complaints or established their entitlement to such relief, the lower courts inequitably displaced more senior nonminority incumbents who are innocent of any wrongdoing. These black employees proffered no entitlement to preferential treatment other than their race. The resulting orders run contrary to the congressional directives embodied in §§ 703(h) and 703(j) of Title VII.

ARGUMENT

I. THE MODIFICATION OF THE CONSENT DECREE HEREIN TO IMPOSE A SUBSTANTIAL NEW PROVISION IN THE ABSENCE OF AN ADJUDICATED VIOLATION OF THE LAW CONTRAVENES FUNDAMENTAL PRINCIPLES GOVERNING JUDICIAL INTERPRETATION AND ADMINISTRATION OF CONSENT DECREES.

A. Consent Decrees Must Be Construed Within Their "Four Corners."

The District Court modified a consent decree to impose a substantial new term affecting the petitioners. This modification was ordered in the absence of *any* adjudication of a violation of the law against petitioners or admissions to that effect. The Union submits that this modification constitutes clear error which requires reversal.

The governing rule of construction, and its rationale, were stated plainly and aptly by the Court in *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties

> each give up something they might have won had they proceeded with litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. *For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.* Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, *the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.*

(Emphasis added; footnote omitted.) *See also United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959); *Hughes v. United States*, 342 U.S. 353 (1952).

Despite its citations to *Armour* (Pet. A. 23-24), the Court of Appeals failed to apply its substance. The District Court determined that the proposed layoffs and demotions under consideration were a circumstance "not provided for in the text of the decree" (Pet. A. 8, 73).[12] Neither respondents nor the Court of Appeals has challenged this determination. It is manifest that the lower courts have reached outside the "four corners" of the 1980 Decree to impose a new obligation not agreed to by the City in contravention of the principles stated in *Armour*.

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[12] The Court of Appeals argues that the District Court "properly recognized" that the respondents did not seek to modify the decrees, but merely sought to "compel compliance with the terms and goals of the decrees" (Pet. A. 33). The determination of the District Court referred to in the text demonstrates that this argument is without merit. It is beyond cavil that the respondents sought relief other than that expressly conferred by the language of the 1980 Decree.

Rather than mandating the result decreed by the courts below, a reading of the "four corners" of the 1980 Decree requires that the City's seniority system, as implemented through the proposed layoff policy, should have been applied. As no provision of the 1980 Decree addressed the City's layoff policies and procedures or prohibited the City's proposed layoffs and reductions in rank by seniority, the District Court's injunction against such action constituted additional affirmative relief beyond that provided in the 1980 Decree. Further, the 1980 Decree contains respondents' express agreement to "*seek no further relief . . . save to enforce the provisions of this Decree, thereby waiving the right to seek further relief*" (emphasis added). The plain language of this waiver unmistakably precludes respondents from seeking a modification even if adequate grounds for such a modification might have existed otherwise.

Rather than limiting itself to an analysis of the "four corners" of the 1980 Decree, the Court of Appeals impermissibly resorts to an interpretation of the purposes and motivations of the 1974 and 1980 Decrees (Pet. A. 2, 3, 25, 36). This approach, as noted in *Armour*, impermissibly invites consideration of how the decree might have been written had the respondents established their factual claims and legal theories in litigation. *Armour*, 402 U.S. at 682. By departing from the "four corners" of the 1980 Decree, the Court of Appeals exceeded its authority.

B. In Interpreting a Consent Decree, the Court May Not Consider Extrinsic Evidence Except To Resolve an Ambiguity in the Terms of the Agreement.

The *Armour* "four corners" rule is consistent with the ordinary principle of contract construction that resort to extrinsic evidence is permissible only when the decree itself is ambiguous. *See Fox v. United States Department of Housing and Urban Development*, 680 F.2d 315, 319 (3d Cir. 1982). Otherwise, as *Armour* teaches, inter-

pretation of a consent decree is normally a question of law based upon the instrument itself.

As noted above, the District Court determined that the proposed layoffs and demotions were not provided for in the text of the decree (Pet. A. 8, 73).[13] As the 1974 and 1980 Decrees were silent in regard to layoffs, there is clearly no ambiguity in the decrees that would call for reference to extrinsic evidence to aid interpretation. The consideration of such evidence by the courts below was in error (Pet. A. 9 n.5, 31, 37). As *Armour* further indicates, the interpretation of a consent decree does not rest on the subjective intent of the parties, rather it involves an interpretation of the meaning of the words used by the parties. *Fox*, 680 F.2d at 320. The 1980 Decree was silent as to layoffs. In fact, neither relief from the City's layoff policies nor seniority relief was sought in the respondents' complaints (J.A. 11-12, 17). While the 1980 Decree was the result of "intense negotiations" (Pet. A. 2), the record does not demonstrate that constructive competitive seniority, layoff practices or policies or the potential for layoffs was considered. Certainly, none of the subjects were addressed in the decree itself.

Respondents waived further relief in the face of the city-wide seniority policy (J.A. 49), the mention of the seniority system in the 1974 Decree (Pet. A. 8; J.A. 103) and the explicit applicability of the seniority system to layoffs contained in the Union's Memoranda of Understanding with the City (Pet. A. 81; J.A. 119). In light of these considerations, the conclusion of the Court of Appeals that the potential for seniority-based layoffs by the City was an unanticipated change in circumstances (Pet. A. 2) is in error. At the very least, it was capable of anticipation by respondents. Indeed, it is now clear that respondents seek the federal courts to bail them out after they failed to complain about and failed to nego-

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[13] The conclusion of the Court of Appeals to the contrary was in error (Pet. A. 33).

tiate about layoffs, once confronted by actual layoffs. Respondents actually seek to have the courts rewrite their settlement agreement for them after they failed to address a subject they now see they should have addressed.

In point of fact, respondents failed to insist to impasse, as it were, on the conferral of any constructive competitive seniority. The record is quite clear that Mayor Wyeth Chandler was opposed adamantly to the abrogation of the seniority status of incumbent employees. As the Mayor testified:

> It is my opinion that under the Consent Decree, we agreed to hire, we agreed to promote, and we agreed to do it in percentages, or what have you. And be fair and equitable, and I felt that that was fair and equitable, that I did then agree to it, consented to it.
>
> But I certainly felt differently towards any policy that would put people out of work, put them on the street, based anything other than on the thing that has been used in every city in this country, in every business in this country, and by the city, and in the Consent Decree since 1974, and that is the seniority policy in the union agreement, and everything else.

(J.A. 37-38) Respondents certainly apprehended that the terms of the 1980 Decree constituted the best negotiated setlement that could have been exacted from the City. Rather than risking the potential for a less favorable outcome at trial, respondents accepted a settlement that gave them less than what might potentially have been gained at trial. Respondents now seek to add to the 1980 Decree, through judicial modification, relief that could not have been gained through negotiation and settlement.

The conclusion is inescapable that respondents have not sought enforcement of the terms of the decrees as required by *Armour*. Instead, respondents sought imposition of an additional term beyond the City's consent. The only prior instance in which this Court has endorsed

imposition of new and substantial burdens on a defendant party to a consent decree, *United States v. United Shoe Machinery Co.*, 391 U.S. 244 (1968) (see discussion in *Fox*, 680 F.2d at 323), is inapposite due to lack of an adjudication of a violation of the law herein to support the imposition of such burdens. In the instant circumstance, it is impermissible for respondents to draw on a consent which, by its very terms, is not available. *See Ford Motor Co. v. United States*, 335 U.S. 303, 322 (1948). The City had not agreed to constructive competitive seniority relief or to any relief which affected the routine application of its seniority system, as clearly stated by Mayor Chandler (J.A. 37-38).

C. Nonconsentual Modification of a Consent Decree May Be Allowed Only upon the Establishment of a Proper Predicate Absent Herein.

The Court of Appeals framed the principal issue raised on appeal in terms of "whether the District Court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs." (Pet. A. 12) Even if the courts below were not limited to an interpretation of the "four corners" of the 1980 Decree under *Armour*,[14] those courts were still without authority to modify the 1980 Decree to afford respondents additional relief beyond the scope of that relief conferred by the language of the decree.

Respondents have not sought enforcement of an existing term of the 1980 Decree, but imposition of an additional term beyond the scope of petitioners' consent. There can be no serious contention that petitioners have violated the terms of the 1980 Decree (Pet. A. 75). *Cf. United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975). Neither did the City announce its intention to renounce or repudiate its commitment to achieving the

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[14] The Union contends that this should be the case for the reasons noted above, particularly in light of the respondents' express waiver of additional relief. (*See* Pet. A. 61).

long-term goals contained in the 1974 and 1980 Decrees as the Court of Appeals intimates (Pet. A. 33). Thus, the Court must determine whether, in the absence of an adjudication of a violation of the law or a showing of a violation of the terms of the decree, the lower courts have the authority to modify the 1980 Decree to impose a new term not previously agreed to by the petitioners.

The standard for reopening a consent decree is a strict one; the relief is extraordinary and may be granted only upon a showing of exceptional circumstances. *Fox*, 680 F.2d at 322. There are strong interests in the finality of the judgment of the District Court as embodied in the 1980 Decree. In fact, when the respondents have made "a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment their burden . . . is perhaps even more formidable than had they litigated and lost." *Id.* Respondents failed to carry their burden and should not have been granted a modification.

While courts exercising their equitable jurisdiction are not powerless to alter the terms of a prospectively operating consent decree, this power must only be exercised with circumspection. Modification must not be allowed unless changed circumstances have transformed the original decree into an "instrument of wrong." *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). Nothing less than a "clear showing of grievous wrong evoked by new and unforeseen conditions" should lead a court to change or modify the terms of the original decree. *Id.* at 119. The Court of Appeals justified its affirmance of the District Court on the basis that the 1980 Decree had been transformed into an "instrument of wrong" by new and unforeseen circumstances constituting a "fundamental change in the essential facts upon which the decree [was] based" (Pet. A. 34-37). The Union takes exception to this conclusion and the premises on which it is based.

The essential facts upon which the 1980 Decree was based, that the respondent class was involved in an employer-employee relationship in a circumstance in which city-wide seniority was a relevant factor in certain job decisions, including potential layoffs, had, in fact, not changed as a result of intervening circumstances since the entry of the 1980 Decree. Nor had the City abandoned or repudiated the long-term goal agreed to in the 1980 Decree, as the Court of Appeals suggests (*see* Pet. A. 33). Neither were the lower courts justified in their conclusion that the potential for layoffs was unforeseen. The record is clear that the City and the Union anticipated the potential for layoffs as early as 1975 when the following language was included in their Memorandum of Understanding:

> Layoff—In the event it becomes necessary to reduce the Fire Division, seniority alphabetically shall govern lay-offs and recalls. Employees lowest in seniority shall be laid off first and shall be the last to be recalled.

(Pet. A. 81, J.A. 115). The fact that respondents failed to anticipate the potential for future layoffs when they acceded to a waiver of further relief in the 1980 Decree does not justify a finding that the potential for layoffs was unforeseen or unforeseeable in the instant case.

The prospects for layoffs and reductions in force in the City of Memphis Fire Division must also be viewed in light of the instances of such layoffs in other municipalities in the relevant period. A survey of 100 cities conducted in November, 1981 by the U.S. Conference of Mayors indicated that 72 of those cities surveyed had laid off employees or were expecting to lay off employees in the near future. Bureau of National Affairs, *Layoffs, RIFs and EEO in the Public Sector*, Fair Employment Practices Supplement 439, February 13, 1982, p. 23-24. Similar layoffs had previously arisen within the jurisdiction of the Sixth Circuit in Cincinnati, Ohio in 1976,

Youngblood v. Dalzell, 568 F.2d 506 (6th Cir. 1978), and in Toledo, Ohio in 1980, *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981).

The Union also challenges the Court of Appeals' assertion that the 1980 Decree had been transformed into an "instrument of wrong." The "wrong" complained of is that the 1980 Decree, if not modified, would permit the application of the city-wide seniority system in determining the order of layoffs and reductions in rank. The routine application of the city-wide seniority system would have had the effect of temporarily reducing the percentage of blacks in the affected job classifications.[15] The Court of Appeals' value judgment that the routine application of the city-wide seniority system constituted a "wrong" ignores the clear statement of congressional policy embodied in § 703(h) of the Civil Rights Act of 1964. Section 703(h) clearly stands for the proposition that the routine application of a bona fide seniority system is not a "wrong." Since a district court's authority to adopt a consent decree arises only from the statute the decree is intended to enforce, *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961), its authority to modify a decree enforcing such a statute can only be exercised in light of the policies of the statute.

In the area of employment discrimination, the routine application of systems of competitive seniority which have been created or operated without a racially discriminatory purpose has been immunized from the statutory proscriptions against employment practices which, although neutral on their face and in intent, nonetheless discriminate in effect against a particular group. *Teamsters v. United States*, 431 U.S. 324, 348-54 (1977).

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[15] Mayor Wyeth Chandler testified that the effects of the layoffs and reductions in rank were anticipated to be temporary in nature, for example that lieutenants who were bumped down would be back "in rank" within a six-month to two-year period (J.A. 39).

Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), specifically provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin. . . .

As this Court concluded in *Teamsters*, "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." 431 U.S. at 352. In so holding, the Court acknowledged that the longest tenure employees, even though they might without exception be white, would enjoy a " 'disproportionate distribution of advantages [which] in a very real sense [would] operate to 'freeze' the status quo of prior discriminatory employment practices.' " 431 U.S. at 350. Nevertheless, this Court recognized that this perpetuation effect could not overcome "the congressional judgment . . . that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees. . . ." 431 U.S. at 353.

The city-wide seniority system in this case was adopted as an employment policy of the City of Memphis in 1973 (J.A. 49), and has been present in the City's Memoranda of Understanding with the Union since 1975 (Pet. A. 80-81; J.A. 49, 116-19). Respondents have at no time mounted any challenge to the genesis or operation of this system. The system is clearly neutral and nondiscriminatory. Its continued operation is therefore correct and proper under Title VII, even though it may perpetuate the effects of past discrimination by the employer.[16]

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[16] The seniority system is valid under both the United States Constitution and 42 U.S.C. § 1981 absent a showing of discrimina-

The Court of Appeals chose to ignore the clear congressional statement of policy and to impose on the parties its own opinion concerning the "wrongness" of the routine application of the city-wide seniority policy to layoffs. In fact, the modification of the 1980 Decree resulted in a "wrong" inflicted on innocent nonminority incumbents who lost their rank and their jobs as a result of the modification. To the extent that these incumbents were so affected, the lower courts impermissibly "trammel[ed] the interests of the white employees" and sought to "maintain racial balance" at the expense of innocent nonminority incumbents. *Cf. United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979), *reh'g denied*, 444 U.S. 889 (1980).[17]

It is important to note that the question for decision in this case is whether the 1980 Decree should have been

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tory purpose in its inception or operation. *See Washington v. Davis*, 426 U.S. 229 (1976) (Fourteenth Amendment); *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 102 S.Ct. 3141 (1982) (§ 1981).

Title VII was made applicable to the City by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, Mar. 24, 1972). Thus, *any* discriminatory practices on the part of the City predating March 24, 1972 would not have been actionable under Title VII. In this case, the relevant time period for actionable discrimination dates back only to February 23, 1975, 180 days prior to Mr. Stotts' charge filed before the EEOC. Pursuant to 42 U.S.C. §§ 1981 and 1983, respondents could only seek a remedy for intentional discrimination, *General Bldg. Contractors Ass'n v. Pennsylvania*, 102 S.Ct. 3141 (1982); *Washington v. Davis*, 426 U.S. 229 (1976), that took place within one year of the filing of the original complaint herein on February 16, 1977 (J.A. 1, 8).

[17] As a result, the class-based relief imposed upon petitioners by the lower courts in order to maintain the percentage of blacks in each job classification exceeds even that relief to which the City and respondents might have permissibly consented. *See Weber*, 443 U.S. at 208. The Court of Appeals acknowledged that the terms of the decree cannot require the discharge of nonminority workers and their replacement with minorities (Pet. A. 16). It is quite peculiar that the Court of Appeals would conclude that a consent decree could be modified after the fact to provide relief that would have been impermissible if contained in the decree as originally drafted.

modified to impose a duty that was not contained therein, and not, as in *Swift*, whether the defendant should be released from the obligations imposed by the decree. The instances in which such a result has been approved by this Court in prior cases have been limited to those circumstances in which the decree was entered after an adjudication or an admission of a violation of the law on the part of the defendant party to the decree. *See Fox*, 680 F.2d at 323. Both the 1974 and 1980 Decrees contained nonadmissions clauses (Pet. A. 60; J.A. 99). The 1974 Decree provided that it "shall not constitute an adjudication or admission by the City of any violation of law or findings on the merits of this case" (J.A. 99). Where there has been no adjudication or admission of a violation of the law, as in this case, the proper predicate does not exist for the imposition of additional relief without the consent of the parties affected thereby. *See United States v. Atlantic Refining Corp.*, 360 U.S. 19, 23 (1959); *Hughes v. United States*, 342 U.S. 353, 357-58 (1952); *Fox*, 680 F.2d at 323. As the consent decrees involved herein were entered without an admission or an adjudication of a violation of the law and without fact findings that would support the imposition of further relief, the proper predicate did not exist for the nonconsentual modification of the 1980 Decree over petitioners' objections.

Apparently, the Court of Appeals acknowledged the need for an admission of a violation to support the imposition of additional relief. To find an admission, the Court of Appeals would stretch the City's disclaimer of wrongdoing beyond recognition and into an admission of wrongdoing:

> In the context of consent decrees providing affirmative action relief, we interpret the disclaimer of wrongdoing to be an admission that there is a statistical disparity which the defendants cannot unequivocally explain, together with a reservation of the right to attempt to explain it at any other time.

(Pet. A. 15 n.10) (Citations omitted) Such an interpretation of a disclaimer of wrongdoing, if allowed to stand, would have a serious negative impact upon the potential for future settlement of Title VII litigation.

Even if under some "exceptional" circumstances a court might have the authority to modify a consent decree over the objection of defendant parties thereto or impose new obligations in the absence of an admission or adjudication of a violation of the law, such exceptional circumstances do not exist herein. Viewed in their best light, respondents' contention is that their expectations would have been frustrated by the seniority-based layoffs caused by fiscal circumstances beyond the control of the City that might have been anticipated by respondents and addressed in negotiations with the City. Such a circumstance does not constitute an "exceptional" circumstance. *Accord Fox*, 680 F.2d at 323. The municipal layoffs in this case was a possibility that respondents should have considered or anticipated for the reasons detailed above. Also, the petitioners had not been guilty of misconduct that might have made equitable the imposition of involuntary duties without a prior adjudication.[18]

Rather than demonstrating the existence of exceptional circumstances which might make equitable the reopening of the 1980 Decree to provide further relief to respondents, the record establishes that the modification was inequitable. Respondents waived their entitlement to further relief beyond that granted by the strict terms of the 1980 Decree (Pet. A. 61). To impose additional duties under the 1980 Decree is to disregard the basic rights of

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[18] Despite the Court of Appeals' citations to *Brown v. Neeb*, that case is distinguishable from this case. Unlike *Brown*, the City is not an adjudicated discriminator, as was the City of Toledo. *See* 644 F.2d at 553. Respondents could not establish that the City had been recalcitrant in its compliance with the obligations imposed by the 1974 and 1980 Decrees. Unlike *Brown*, the City had approached or exceeded its hiring goals (J.A. 48). It was not established that the City had been defiant or contemptuous (Pet. A. 74-75).

petitioners who waived their right to litigate defenses by consenting to have a decree entered against them. The conditions upon which rights are waived must be respected. *Armour*, 402 U.S. at 682.

The Court of Appeals' analysis would subject parties to a consent decree to a virtually unlimited power of modification by district courts whose lodestar would be their determination of what the parties would have agreed to on a certain issue if, indeed, they had thought about it. Rather than encouraging compromise and settlement, this approach fosters uncertainties that reduce the incentive of employers and unions to settle employment discrimination litigation and increases the likelihood of challenges from concerned third parties, particularly labor unions in cases in which they are not parties. Thus, the Court of Appeals' analysis actually makes the chances of settlement in an employment discrimination case much less likely due to remaining uncertainties as to what changes a district court could make in the decree in the future.

II. THE INVOLUNTARY CLASS-BASED RELIEF GRANTED BELOW CONTRAVENES THE STATUTES THE COURTS SOUGHT TO ENFORCE.

A. The Order of the District Court Granted Relief in Addition to that Sought in the Complaint and Granted in the Decrees Without Establishing Petitioners' Liability or Respondents' Entitlement to the Relief.

By the 1974 Decree, the City agreed to a long-term goal of "achieving throughout the work force proportions of black and female employees in each job classification, approximating their respective proportions in the civilian work force." (J.A. 101) To achieve this goal, the City agreed to interim hiring goals in entry level positions (Pet. A. 63-65; J.A. 101). The 1980 Decree supplemented this relief previously agreed to by providing promotional goals (Pet. A. 65-66) and monetary relief in the form of back pay (Pet. A. 66).

The 1980 Decree recites that respondents had brought actions against the City alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended and made applicable to the City by the Equal Employment Opportunity Act of 1972 and 42 U.S.C. §§ 1981 and 1983. The City, however, did not admit to having violated the law by discriminating on the basis of race or sex in its employment practices (Pet. A. 60), nor had a violation of the law been adjudicated or admitted by petitioners in any other context (*see* J.A. 99). Neither decree endeavored to identify particular victims as being actual victims of discrimination.

By the nonconsentual modification of the 1980 Decree, the lower courts exceeded their remedial authority. As pointed out in Part I, *supra*, the lower courts could not draw their authority to modify the 1980 Decree from its terms. In addition, the record before the District Court is insufficient to support the relief ordered herein under the applicable statutes.

The relief imposed upon the petitioners modified the 1980 Decree to forbid the City from applying the city-wide seniority policy "insofar as it will decrease the percentage of black [firefighters in certain job classifications] that are presently employed in the Memphis Fire Department." (Pet. A. 78, City Pet. A. 80, 83) As a result of these orders, the City was required to lay off and reduce in rank more senior incumbent nonminority employees to maintain the precise racial balance previously existing in each job classification affected by the order.

The first infirmity of the judicially imposed modifications is that those orders afford respondents substantial relief in the absence of a proven violation of the law. The orders below bypass the "liability" phase of litigation and enter the remedial phase without the support of a proven finding of discrimination on the part of petitioners.[19]

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[19] *See* D. Dobbs, *Handbook on the Law of Remedies*, § 1.1 (1973). The law of judicial remedies concerns itself with the nature and scope of the relief to be given a plaintiff once *he has followed*

As the 1980 Decree was not grounded on findings of discrimination against petitioners, no further relief was appropriate beyond that originally granted in the decree itself, particularly in view of respondents' express waiver of further relief (Pet. A. 61). Even if the proof submitted to the District Court at the preliminary injunction hearing was adequate to raise some inference of discrimination, respondents had additionally "waive[d] a hearing and findings of fact and conclusions of law on all issues raised by the complaints." (Pet. A. 60)[20] Thus, even if the respondents had prayed for constructive competitive seniority in their complaints, which they did not, that potential relief was lost at the time the 1980 Decree was entered.

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appropriate procedure in court and has established a substantive right (Emphasis added).

In accordance with these principles, this Court has observed that district courts must limit nonconsentual relief to circumstances in which an illegal discriminatory act or practice is proven or found. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758 (1976).

[20] After the City articulated its reasons for implementing seniority-based layoffs (*see, e.g.*, J.A. 37-38, 43-44), the ultimate burden of persuasion remained with respondents. As the Court explained in *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057 (1982):

> In Burdine we reiterated that after a plaintiff has proved a prima facie case of discrimination, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" *The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."* It was then made clear that:
>
> "The defendant need not persuade the Court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."

Id. at 3062 n.7 (citations omitted; emphasis added). The courts below ignored this method of analysis and implemented a remedy without a supporting finding of discrimination.

B. A Court May Not, in Order To Achieve a Particular Racial Balance, Direct that Innocent Incumbent Employees Be Deprived of Their Jobs so that Those Jobs May Be Filled by Persons of Another Race Who Have Not Been Adjudicated as Victims of Unlawful Discrimination.

Even if the initial infirmity, lack of a proven violation of the law, was not present, the Union submits that the orders of the lower courts must be reversed as being beyond the scope of the District Court's remedial authority. As set forth above, respondents sought relief in their complaints for alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 and 42 U.S.C. §§ 1981 and 1983. While violations of these statutes have not been proven against petitioners, these statutes provided the basis for any relief to which respondents might have been entitled, even had these cases been fully litigated.

Where private litigants assert claims arising under federal statutes, federal courts may exercise their jurisdiction to fashion relief only to the extent consistent with the applicable statute. *See System Federation No. 91*, 364 U.S. at 651. When the authority of the federal courts derives from an act of Congress, substantive rights simply do not exist if they are not created by the statute. "[I]n our constitutional system, the commitment to the separation of powers is too fundamental for [the courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public will.'" *TVA v. Hill*, 437 U.S. 153, 195 (1978).[21]

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[21] Title VII, of course, epitomizes Congress' formulation of public policy. When Congress so acts, it supplants with its own views any judicial determination of public policy. *Cf. United States v. Atlantic Mutual Ins. Co.*, 343 U.S. 236, 245 (1952) (Frankfurter, J., dissenting). *Compare Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946) *with Northwest Airlines Inc. v. Transport Workers*, 451 U.S. 77 (1981).

Thus, the pertinent inquiry is whether Title VII and 42 U.S.C. §§ 1981 and 1983 authorize the relief afforded respondents by the lower courts.[22] The focus of these statutes is to afford protection to individuals, not to minority groups as a whole.[23] It is clear that the relief available under §§ 1981 and 1983 is limited to relief to actual victims of discrimination. As the Court has stated:

> . . . the remedy is necessarily designed, as all remedies are, to restore the *victims* of discriminatory conduct to the position they would have occupied in the absence of such conduct.

Milliken v. Bradley, 418 U.S. 717, 746 (1974) ("Milliken I"); *see also Milliken v. Bradley*, 433 U.S. 267, 281 (1977) ("Milliken II"). Also, the remedies specified under Title VII to rectify illegal employment discrimination are consistent with and define the scope of relief available in the instant context under 42 U.S.C. §§ 1981 and 1983.

The choice of law provision, 42 U.S.C. § 1988, specifies the law to be applied to remedy violations of 42 U.S.C. §§ 1981 and 1983. This section provides in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title . . . for the protection of all persons in the United States, in their civil rights, and for their

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[22] The Union would show that this inquiry is largely academic in the absence of a proven violation of these statutes on the part of petitioners. No violation having been found, it was simply beyond the power of the District Court to fashion a remedy for a wrong that had not been proven.

[23] *See Connecticut v. Teal*, 102 S.Ct. 2525, 2534 (1982) ("The principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and legislative history are replete with references to protection for the individual employee. *See, e.g.*, §§ 703(a)(1), (b), (c). . . .") (Title VII); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (constitutional violations).

> vindication, shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable to carry the same into effect. . . .

"This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969). As § 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) defines the remedies that a court may order upon finding employment discrimination, application of § 706(g) in providing remedies for violations of 42 U.S.C. §§ 1981 and 1983 in the employment discrimination context best serves the policies expressed in those federal statutes.

The remedial provision of Title VII, § 706(g), contains a limitation in its last sentence that bars the relief prescribed by the lower courts. That sentence reads in pertinent part:

> No order of the court shall require the . . . reinstatement of an individual as . . . an employee . . . if such individual . . . was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin. . . .

This section requires a court "to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the *victims* of racial discrimination in hiring." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976) (footnote omitted); *accord, Teamsters*, 431 U.S. at 364. The District Court's orders in this case are contrary to both the language and spirit of this provision.

The District Court's orders afforded relief to members of the respondent class on the basis of their race alone without consideration of whether the individual members of the class were actual victims of discrimination. Those orders explicitly sought to maintain the racial balance

then prevailing in each affected job classification (Pet. A. 78). Obviously, as no violations of the law had been proven against petitioners in regard to the class, no individuals could claim proven victim status. Instead of limiting relief to victims, the District Court ruled that the layoffs could only proceed if the respondent class was not disproportionately affected thereby. To the extent that it did so, the District Court imposed for the first time in this litigation strict quotas upon the racial balance in the work force.

In addition to the plain language of § 706(g), the legislative history of Title VII demonstrates that Congress meant to forbid such a result. The opening speech on the floor of the House of Representatives in support of the Act was delivered by Representative Celler, the Chairman of the House Judiciary Committee. A portion of that speech was devoted to answering the "unfair and unreasonable criticism" that had been leveled against the bill:

> In the event that wholly voluntary settlement proves to be impossible, the Commission could seek redress in the federal courts, but it would be required to prove in the court that the particular employer involved had in fact, discriminated against one or more of his employees because of race, religion or national origin. . . .
>
> Even then, the court could not order that any preference be given to any particular race, religion or other group but would be limited to ordering an end to discrimination [110 Cong. Rec. 1518 (1964)].

Subsequent to the House's passage of the bill, the Republican sponsors in the House published a memorandum describing the bill as passed. In pertinent part, the memorandum stated:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the accept-

> ance or reinstatement of a union member. *But Title VII does not permit the ordering of racial quotas in business or unions and does not permit interferences with seniority rights of employees or union members.* [*Id.* at 6566; emphasis added].

When the bill was taken up by the Senate, Senators Humphrey and Kuchel, the co-managers of the bill, undertook a description of each of the titles. In the course of his description of Title VII, Senator Humphrey detailed the manner in which discrimination claims could be processed through suit and finding of discrimination, and then described the remedial powers available to a court:

> The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the Court could order appropriate affirmative relief, such as hiring or reinstatement of employees and payment of backpay. This relief is similar to that available under the National Labor Relations Act in connection with the unfair labor practices, 29 United States Code 160(b). *No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of section 707(e)* [enacted, without change, as section 706(g)]. . . .
>
> *Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.*
>
> That bugaboo has been brought up a dozen times; but is nonexistent. [*Id.* at 6548; emphasis added]

Senator Kuchel made the other major opening speech in support of the bill. He, too, took pains to demonstrate that the remedial provisions would not permit court-ordered quotas:

> Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous federal inspectors into our economic life. Those inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to mediate or conciliate the dispute. It would have no authority to issue orders to anyone. Only a federal court could do that, and *only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred.* Any order issued by the Federal district court would of course be subject to appeal. *But the important point, in response to the scare charges which have been widely circulated to local unions throughout Amercia, is that the court cannot order preferential hiring or promotion consideration for any particular race,* religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occuring. [*Id.* at 6563; emphasis added]

Each day during the Senate debates on the civil rights bill, the principal Senate sponsors prepared a bipartisan civil rights newsletter which was hand-delivered to the office of each senator supporting the bill. Its purpose as explained by Senator Humphrey was "to keep senators who are in favor of civil rights legislation informed of our point of view." *Id.* at 5042. The April 11, 1964 issue of the newsletter, published two days after the filibuster had begun, declared:

> Under title VII, *not even a Court,* much less the Commission, *could order racial quotas or the hiring, reinstatement, admission to membership or payment*

> *of back pay for anyone who is not discriminated against in violation of this title.* [*Id.* at 14465; emphasis added]

On May 25, Senator Humphrey introduced a brief explanation of the House bill which he said had been "read and approved by the bipartisan floor managers of the bill in both houses of Congress." *Id.* at 11847. In pertinent part, the explanation provided:

> The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay, . . .
>
> *The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment* [*Id.*; emphasis added].

The legislative history of the 1964 Act reveals the strong intention of its proponents to disclaim any inference that courts would be empowered by the provisions of the Act to render any order that would afford a preference on the basis of race, impose racial quotas or, in short, grant any relief prior to the establishment in court that discrimination had, in fact, occurred. These assurances were necessary to ensure passage of the Act. *See Weber*, 443 U.S. at 206.

The only legislative act in the interim since 1964 is the passage of the Equal Employment Opportunity Act of 1972 which amends Title VII in several respects. In essence, the 1972 law amends §§ 701, 702 and 704 to broaden Title VII's scope of coverage, and amends §§ 705 and 706 to grant the EEOC the authority to investigate charges and to bring suits in federal court. Section 703 of Title VII was not amended at all and the only arguably pertinent changes made in 706(g) were the follow-

ing additions to its first sentence (the new language is indicated in italics):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate.*

The italicized language had its origin in an amendment introduced by Senator Dominick, who was leading one faction of a filibuster against the Senate Labor Committee bill. The most significant aspect of the committee bill—and the principal issue causing the filibuster—was a proposal to confer "cease and desist" authority on the EEOC; that bill proposed to make no change in either § 703(a) or § 706(g). Adoption of the Dominick amendment, which denied the EEOC independent enforcement power and instead empowered the EEOC to institute lawsuits in federal court, was the key to ending the filibuster. Neither Senator Dominick nor anyone else explained or even discussed the purpose of the additional language in the first sentence of § 706(g), and the only explanation therefor is that contained in a section-by-section analysis prepared by Senator Williams, the Chairman of the Labor Committee and the manager of the legislation:

> *Section 706(g)*—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may

> be appropriate including, but not limited to, reinstatement or hiring, with or without back pay, as will effectuate the policies of the Act. Back pay is limited to that which accrues from a date not more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person(s) would operate to reduce the back pay otherwise allowable.
>
> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.* [118 Cong. Rec. 7166, 7168 (1972); emphasis added]

As this Court explained in *Franks*, 424 U.S. at 764 n.21, the Congress that "added the phrase speaking to 'other equitable relief' in section 706(g) . . . indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder" and, the court understood the portion of the section-by-section analysis quoted above to be "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require *to effect restitution, making whole insofar as possible the victims of racial discrimination. . . .*" *Id.* at 764 (emphasis added).

There is not a word in the legislative history to suggest that "other equitable relief" was added to § 706(g) to authorize quota remedies, and it is hardly conceivable

that so profound a departure from the anti-quota decision of Congress in 1964 would have been accomplished without some evidence of an intention to do so.

The decisions of this Court regarding permissible remedies under § 706(g) have consistently drawn the line where Congress intended it to be drawn. While courts are certainly permitted to fashion make-whole relief, including constructive competitive seniority, for "actual victims of racial discrimination" *see Franks*, 424 U.S at 772, individual entitlement to relief such as constructive competitive seniority must be established even if a pattern or practice of discrimination has been proven. *See Teamsters*, 431 U.S. at 356-77. Even so, any award of relief, including constructive competitive seniority, must be predicated upon an established violation of the Act. As stated in *Teamsters*:

> *[T]he question of individual relief does not arise until it has been proved that the employer has followed an employment policy of discrimination.*

Id. at 361 (emphasis added). *See also Franks*, 424 U.S. at 791-92 (Powell, J., concurring in part and dissenting in part).

As the legislative history demonstrates, the limitations imposed by Congress on relief available pursuant to Title VII was motivated in no small part due to the concern that innocent nonminority incumbents might be displaced unfairly by class-wide awards of constructive competitive seniority. Provisions such as §§ 703(h) and (j) (discussed in Part II.C., *infra*) are indicative of this concern. As the Fifth Circuit noted in *Paperworkers Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970):

> It is one thing for legislation to require the creation of fictional seniority for newly hired Negroes, and quite another thing for it to require that time actually worked in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring

> employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. *In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race.*

Id. at 995 (emphasis added).[24] The relief afforded to respondents herein clearly crosses over into the impermissible, preferential category of relief and would be invalid even had the proper predicate been laid for some relief due to an adjudicated violation of the Act.

The preferential relief granted below is inequitable in nature as the courts have deprived innocent nonminority incumbents of their jobs or their rank so that they might be replaced by employees who were not adjudicated victims of discrimination. As the Court stated in *Teamsters*:

> [T]he extent to which the legitimate expectations of nonvictim employees should determine when victims are restored to their rightful place is limited by basic principles of equity. In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the "qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Es-

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[24] *Paperworkers* was cited with approval by this Court in *Teamsters*, 431 U.S. at 354 n.40. The Court observed that: "Title VII did not proscribe the denial of fictional seniority to pre-Act discriminatees who got *no* job." *Id.*

> pecially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what is workable."

431 U.S. at 374-75 (citations omitted). While it defended the District Court's orders on the basis that the District Court "did not issue a blanket order enjoining the layoff of all minority workers" (Pet. A. 37), the Court of Appeals ignored the equitable considerations imposed by the very statute which it sought to enforce and sanctioned a remedy which impinged upon the expectations of innocent nonminority incumbents in favor of employees who had neither claimed or established "victim" status.

The lower courts have substituted their own notions of an appropriate remedy for the restrictions on judicial relief imposed by § 706(g). While § 706(g) provides discretion to the district courts in structuring relief for individual victims of discrimination once a violation of the law has been proven,

> Such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'
>
> It is true that '[e]quity eschews mechanical rules . . . [and] depends on flexibility.' But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.'

EEOC v. Ford Motor Co., 102 S.Ct. 3057, 3063 (1982) (citations omitted) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-17 (1975)). Since the remedial authority of courts under § 706(g) is limited by the

provision's very terms to effectuating the Act's overriding purposes of bringing discrimination to an end and compensating victims for their injuries, the District Court lacked authority to enter the modification of the 1980 Decree. The persons who benefited from the District Court's class-wide remedy were neither alleged or proven victims of hiring discrimination, and the injunctions against the City's application of its seniority system in respondents' favor distorts the statutory purpose. The District Court's orders unnecessarily and inequitably trammel the interests of nonminority incumbent employees in contravention of and without concern for the principles inherent in the statute.

C. The Particular Concern Congress Expressed for the Operation of a Last-hired, First-fired Rule and the Special Status that Congress Accorded to Seniority Systems Must Be Given Great Weight by a Court When Crafting Affirmative Equitable Relief for Minority Employees.

In addition to the congressional revulsion toward quota remedies, the lower court should have given serious consideration in crafting relief to the particular congressional concern expressed in Title VII for the operation of a last-hired, first-fired seniority system such as was present in this case and for the "special status" that Congress had accorded to seniority systems. Indeed, the Court of Appeals disregarded both the history and purpose of §§ 703(h) and 703(j), 42 U.S.C. §§ 2000e-2(h), 2000e-2(j), and the decisions of this Court in failing to accord sufficient weight to the rights and interests of incumbent employees in the routine application of the city-wide seniority system under the instant circumstances.

1. *Section 703(h).* The plain language and legislative history of 703(h) of the Civil Rights Act of 1964 demonstrate that Congress intended to foreclose attacks under the civil rights laws on bona fide seniority systems. Section 703(h) provides that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2(h). Thus, the language of § 703(h) indicates that the operation of a seniority system is not subject to attack unless it is motivated by an intent to discriminate. *See, e.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). The District Court specifically found that the seniority system or layoff policy here under attack was not adopted with the intent to discriminate (Pet. A. 73). This finding was not challenged by respondents on appeal (Pet. A. 11 n.6). Thus the language of the statute instructs that the City's implementation of its proposed layoff policy would not have constituted a violation of the Act which might provide a predicate for additional relief beyond that provided in the 1980 Decree. Interestingly, the District Court found the seniority system non-bona fide because it had discriminatory effect (Pet. A. 74). Of course, this blatant error in light of *Teamsters* was reversed by the Court of Appeals, although it found the error to be so meaningless as to relegate it to a footnote in the opinion (Pet. A. 11 n.6).

This Court has had the occasion to examine the legislative history of § 703(h) on several previous occasions. *See, e.g., American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). As noted in *Patterson*, § 703(h) was introduced as one of several Senate amendments to the initial bill passed by the House of Representatives, in response to charges that Title VII would destroy seniority rights.

See id. at 72. As part of the effort to clarify the intent and effect of the bill (an effort necessary to ensure its passage), Senator Clark, the floor manager of the bill, inserted three documents into the Congressional Record which the Court has characterized as "authoritative indicators" of the purpose of § 703(h). *Id.* at 73.

One of these documents was a Justice Department memorandum which stated, in part, that:

> If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white employers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. *It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race.* . . . Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

110 Cong. Rec. 7207 (1964) (emphasis added).[25] This memorandum is particularly pertinent herein, instructing that seniority-based layoffs would not contravene the polices of Title VII, even where those layoffs might perpetuate the effect of prior discrimination. As Justice Powell observed in *Franks*:

> The congressional debates leading to the introduction of § 703(h) indicate a concern that Title VII not be construed as requiring immediate and total restitution to the victims of discrimination regardless of cost in terms of other workers' legitimate expectations. Section 703(h) does not restrict the remedial

[25] The other documents submitted by Senator Clark are to similar effect. *See Patterson*, 456 U.S. at 73.

> powers of a district court once a discriminatory practice has been found, but neither are the concerns expressed therein irrelevant to a court's determination of "appropriate" equitable relief under § 706(g).

424 U.S. at 791-92 (Powell, J., concurring in part and dissenting in part). *See also Teamsters*, 431 U.S. at 372. ("Moreover, *after the victims have been identified and their rightful place determined*, the District Court will again be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing" (emphasis added)). In the instant case there has been no finding of post-Act discrimination violative of the Act on the part of petitioners and no individual member of the respondent class has been adjudicated a victim. The legitimate expectations of nonminority incumbents cannot be forced equitably to yield to provide constructive competitive seniority to respondents.[26] As the 1980 Decree contains no grant of constructive competitive seniority, respondents simply must assume their place in the city-wide seniority system on the basis of their date of hire by the City with all attendant consequences.[27]

The Court recently discussed these same concerns in a different context:

> Although Title VII remedies depend primarily upon the objectives discussed above, the statute also permits us to consider the rights of "innocent third par-

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[26] Lower courts have expressly held that the permissible relief for actual discriminatees does not extend to "bumping" employees previously occupying jobs; victims must wait for vacancies to occur. *See, e.g., Patterson v. American Tobacco Co.*, 535 F.2d 257, 267 (4th Cir. 1976); *Paperworkers Local 189*, 416 F.2d at 988.

[27] In point of fact, the city-wide seniority system at issue herein is most equitable in its application to the respondents. The system does not place recently promoted blacks at a competitive disadvantage vis-a-vis their nonminority counterparts in the same rank. Instead, an employee's seniority is calculated in terms of his date of hire by the City for all purposes (J.A. 67, 103).

> ties." . . . The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination. As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees. In light of the "overriding importance" of these rights, *we should be wary of any rule that* encourages job offers that *compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination.*
>
> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. *If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely* while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. *We do not believe that " 'the large objectives' " of Title VII . . . require innocent employees to carry such a heavy burden.*

EEOC v. Ford Motor Co., 102 S.Ct. at 3069-70 (emphasis added). These same considerations apply with equal, if not greater, force in the instant circumstance. In this case the lower courts have abrogated the seniority of incumbent nonminorities in favor of individuals who have settled their claims short of adjudication, establishment of victim status or entitlement to constructive competitive seniority. The orders below impermissibly require innocent nonminority incumbents to carry a burden which is not theirs to bear.

2. *Section 703(j)*. In addition to the considerations and policy concerns expressed in § 703(h), the propriety of

the orders of the courts below must be weighed against similar congressional concerns expressed in § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), which states that Title VII shall not:

> be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in the available work force in any community. . . .

In requiring the City to maintain the then existing percentages of blacks in each affected job classification, the orders of the District Court ran afoul of the very terms of § 703(j).

The legislative history of § 703(j) supports this conclusion. Like the legislative history of § 703(h), that of § 703(j) has been examined in depth by the Court. In *Weber*, the plurality and dissenting opinions all examined the legislative history of § 703(j) and concluded that the provision resulted from congressional concern that Title VII "would be interpreted to *require* employers with racially imbalanced work forces to grant preferential treatment to racial minorities. . . ." 443 U.S. at 205. *See also id.* at 217 (Burger, C.J., dissenting); *Id.* at 227-28 (Rehnquist, J., dissenting).

In light of the language and legislative history of Title VII, this Court has ruled that "[d]iscriminatory preference, for any group, minority or majority, is precisely and only what Congress has proscribed," *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and that "Title VII prohibits racial discrimination against the white petitioners . . . upon the same standards as would be applicable were they Negroes. . . ." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976). This Court

has never interpreted Title VII to *require* preference based on race absent identified victims of discrimination.

In a case construing the permissibility of orders very similar to those in the case at bar, the Fifth Circuit has found such orders to be specifically prohibited by § 703(j). In *Watkins v. Steelworkers Local No. 2369*, 516 F.2d 41 (5th Cir. 1975), the court of appeals held that the district court's judgment requiring the reinstatement of black employees to achieve the racial balance existing prior to seniority-based layoffs was in error, stating:

> To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites. . . . *The result which plaintiffs seek, therefore is not that personal remedial relief available under Title VII, but rather a preferential treatment on the basis of race which Congress specifically prohibited in section 703(j).*

Id. at 47 (emphasis added).[28] The orders of the District Court appealed from herein suffer from the same infirmity and must be reversed.

As Justice Powell stated in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), "[r]acial and ethnic distinctions of *any sort* are inherently suspect and thus call for the most exacting judicial examination." *Id.* at 291 (emphasis added). In conducting such examinations this Court has refused to justify allegedly remedial actions solely on generalized societal discrimination. As Justice Powell pointed out in *Bakke*:

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[28] Similar conclusions have been reached on this and other grounds by three other court of appeals panels. *See Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Jersey Central Power & Light Co. v. Local Union 327, IBEW*, 508 F.2d 687 (3d Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

> *We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.*

Id. at 307 (emphasis added). Respondents herein must seek approval of just such a classification at the expense of innocent nonminority incumbents. Findings of violations sufficient to permit the displacement of innocent incumbents must be much more focused than a general finding of overall " 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." *Id.* Such "focused" proof was not presented to the District Court by respondents.[29]

Bakke, and later *Fullilove v. Klutznick*, 448 U.S. 448 (1980), establish a fundamental prerequisite to the imposition of a racial preference classification—a finding of actual prior discrimination. Moreover, the preference must be "a limited and properly tailored remedy to cure the effects of prior discrimination" to pass constitutional muster. *Fullilove*, 448 U.S. at 484. The *Fullilove* court emphasized that the program approved there was very narrowly tailored so that only those minority businesses who had actually suffered from past discrimination would benefit from the quota imposed. In contrast, the preference imposed in the instant case is neither "limited," "properly tailored," based on findings of "prior discrimination," nor a "remedy." As such it must be reversed.

The lower courts have arrived at the wrong result in this case. They bypassed the required analysis and substituted for it their own subjective view of what is right and wrong under the circumstances. By ignoring the fundamental principles underlying Title VII jurispru-

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[29] Indeed, the evidence presented by respondents to the District Court included hiring statistics that dated back to 1950, some 22 years prior to the effective date of Title VII as to the City (Pet. A. 70-71).

dence as set forth above, the lower courts have engaged impermissibly in their own legislative endeavor. *See Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981). The courts below have overstepped their authority and abused their discretion by judicially enlarging upon explicit limitations imposed by Congress on the general remedial provisions in the Act.

CONCLUSION

For the foregoing reasons, the judgment under review in Nos. 82-206 and 82-229 should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

UNITED STATES CODE

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to

furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-2(a)

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h)

Notwithstanding any other provisions of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment

pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

42 U.S.C. § 2000e-2(j)

Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

42 U.S.C. § 2000e-5(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).